

Mr. Louis D. D'Amico
Executive Director
Independent Oil & Gas Association of Pennsylvania
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115 VIP Drive, Suite 110
Wexford, PA 15090-7906

Dear Mr. D'Amico:

Thank you for your letter addressed to EPA Administrator Christine Todd Whitman, dated June 12, 2001. The Administrator has asked me to respond to your letter regarding the applicability of the National Pollutant Discharge Elimination System (NPDES) permitting program to storm water discharges resulting from clearing, grading and excavation associated with oil and gas extraction operations. In your letter, you express concern about the Agency's interpretation of statutory and regulatory provisions that exempt storm water discharges from certain oil and gas operations and facilities, as well as provisions that apply to storm water discharges resulting from clearing, grading and excavation ("construction activity"). Your position is that EPA should not interpret the statute and regulations to require NPDES permits for discharges from construction activities associated with oil and gas activities based on the permitting moratorium at Clean Water Act (CWA) section 402(l)(2). 33 U.S.C. § 1342(l)(2).

Section 402(l)(2) provides that:

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of storm water runoff from ... oil and gas exploration, production, processing, or treatment operations or transmission facilities composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

33 U.S.C. § 1342(l)(2)(emphasis added). You are concerned that application of the NPDES permit program for storm water discharges resulting from clearing, grading, and excavation associated with oil and gas operations is inconsistent with the underscored language.

You correctly note that under past and current EPA policy (since approximately 1992), the Agency has interpreted the CWA and the NPDES permit application regulations for storm water to apply to point source discharges from all forms of construction activities, including clearing, grading and

excavation, that result in the disturbance of five or more acres of total land area regardless of the ultimate purpose for the land disturbance. The underlying environmental concerns addressed by the NPDES permit requirements for discharges associated with construction activities, primarily erosion and sedimentation, which are typically characterized by such metrics as total suspended solids, total settleable solids, and/or turbidity, tend to differ from the environmental concerns associated with runoff from industrial sites where the soil is stabilized (the pollutants of concern for “non-construction” industrial sites may vary considerably from site to site depending on subsequent development and use of the site). Mobilization of disturbed soils is the inevitable result of contact with precipitation and may lead to erosion and sedimentation—regardless of the ultimate site use.

The Agency does not interpret the statutory exclusion for “oil and gas exploration, production, processing, or treatment operations or transmission facilities” to refer to the clearing, grading, and excavation of land surfaces, i.e., construction, that precedes such operational activities. Therefore, the statutory references to uncontaminated and non-contact runoff do not constrain EPA’s interpretation. The type of construction activities which typically precede oil and gas operations, as identified in the fact sheet for 1995 NPDES general permit for storm water discharges associated with industrial activity, are construction of access roads, drill pads, reserve pits, personnel quarters and surface impoundments. 60 Fed. Reg. at 50915. Similarly, an industry publication, *A Primer of Oilwell Drilling* (4th ed., 1979), under the section “Preparing the Site,” explains that, “[for] an ordinary land location, the site is cleared and leveled, and access roads and a turnaround are built.” These construction activities are fundamentally dissimilar, with different associated pollutants, from the non-construction industrial activities specified in the fact sheet for the general permit, i.e., well drilling, well completion/stimulation, production, equipment cleaning and repairing, and site closures. 60 Fed. Reg. at 50915. Only when storm water discharges from these latter activities are not contaminated by or do not come into contact with overburden, raw material, intermediate products, finished product, byproduct, or waste products, does the permit moratorium in section 402(l)(2) apply.

Regarding your question, “if the construction of wellsites and pipelines are not subject to the exemption, what is exempted?,” the response is again: non-construction wellsite and pipeline activities relating to oil and gas exploration are subject to the CWA exemption, whereas construction activities typically preceding exploratory drilling are not. This translates, under NPDES and the CWA, to a permit authorization requirement for point source discharges from such construction activity disturbing at least five acres. After March 10, 2003, however, the size restriction for permitting any construction activity would drop to one acre (unless the NPDES agency allows waivers of the permit requirement for point source discharges from sites disturbing between one and five acres). A critical requirement in EPA’s general permits for discharges associated with construction activity is achieving stabilization of disturbed areas, a necessity for terminating permit coverage. Permit requirements for discharges of other types of industrial storm water do not similarly terminate.

After termination of the permit requirement for construction storm water discharges, whether an NPDES permit is required for subsequent discharges depends on the next use or activity at the site. For example, the vast majority of construction projects are for commercial and residential uses and the NPDES permit requirement applicable to these sites typically do not continue for the sites’ storm water discharges (although discharges from such sites might continue to require permit authorization on the part of the associated operator of the municipal separate storm sewer system). These sites either do

not have “point source discharges” or were deemed not to be significant sources of pollutants, thereby obviating the need for an NPDES permit.

EPA is sensitive to the economic burden its regulations impose on businesses, and it attempts to minimize costs by designing its general permits to be largely non-prescriptive, i.e., they contain flexibility, options and the ability for operators to design and implement programs using their best professional judgement. The costs of complying with storm water regulations are, in most cases, reasonable as EPA demonstrated in the Storm Water Phase II Economic Analysis, Final Rule Analysis (EPA 833-R-99-002, October 1999), Chapter 4: Cost of Construction Site Controls; and Chapter 8: Analysis of Small Business Impacts.

This letter explains EPA's policy on interpretation of the Clean Water Act. This letter does not establish binding legal requirements. This letter does not apply the interpretation to a discrete set of facts or circumstances. EPA may yet choose to apply this interpretation in a permit proceeding or in enforcement. In fact, EPA Region 6 has issued an NPDES general permit for storm water associated with construction activity that makes general permit authorization available for oil and gas construction site discharges in Oklahoma. 63 Fed. Reg. 36490 (July 6, 1998)

Thank you for your interest in this matter and for bringing it to my attention. If you have any questions, please contact Michael B. Cook, Director, Office of Wastewater Management at (202) 564-0748.

Sincerely,

Diane C. Regas
Acting Assistant Administrator